Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-438

ESTATE OF LEO J. GOLDWATER, Deceased, IRVING D. LIPKOWITZ, and LEE J. GOLDWATER, Executors,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the court of appeals is reproduced in Appendix A and has not been officially reported. The opinion of the Tax Court is reproduced in Appendix B and is reported at 64 T.C. 540 (1975).

Jurisdiction

The judgment of the court of appeals was entered June 29, 1976. An order of the court of appeals denying petitioners' petition for a rehearing is dated August 5, 1977. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether a decedent's estate is entitled to a marital deduction under § 2056(a) of the Internal Revenue Code of 1954 (the "Code") for the value of property passing from the estate to the decedent's widow (his second wife) where the decedent's Mexican divorce from his first wife has been declared invalid by a court of the decedent's domiciliary state in an action in which the decedent's second wife was not joined as a party.

Statute Involved

Section 2056(a) of the Code, 26 U.S.C. 2056(a), provides as follows:

> "(a) Allowance of marital deduction.
>
> For purposes of the tax imposed by Section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c) and (d), be determined by deduction from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."

Statement

The case was submitted to the Tax Court with all facts stipulated, as summarized below.

Leo J. Goldwater ("Leo") married Gertrude B. Goldwater ("Gertrude") on June 20, 1946 in New York, New York where they lived as husband and wife until June, 1955. In December, 1956 Gertrude obtained a New York decree

of separation from Leo. In March, 1958 Leo obtained a Mexican divorce from Gertrude and subsequently married Lee J. Goldwater ("Lee") in Connecticut in December, 1958.

In February, 1959, in an action to which Lee was not made a party, Gertrude obtained a New York declaratory judgment that Leo's Mexican divorce was invalid. (However, the New York court had previously refused to enjoin Leo from remarrying.)

From the time of their marriage in December, 1958, until Leo's death, Leo and Lee lived together as husband and wife in the State of New York. In his Last Will and Testament Leo devised and bequeathed to Lee an interest in property equal to or greater in value than fifty percent of the value of Leo's adjusted gross estate.

On the basis of the foregoing facts, the Commissioner disallowed the estate tax marital deduction claimed by petitioners for amounts passing to Lee on the ground that Lee was not the decedent's "surviving spouse". The Tax Court sustained the Commissioner and the court of appeals affirmed.

Jurisdiction in the Tax Court was based upon 26 U.S.C. 6213 and the basis of jurisdiction in the court of appeals is 28 U.S.C. 2072 and Rule 13 of the Federal Rules of Appellate Procedure.

Reasons for Allowance of the Writ

1. The Decision of the Court of Appeals Involves An Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The determination of marital status for federal tax purposes has become increasingly important as our society has become more mobile and the rate of divorce among

U.S. citizens has continued to escalate in a seemingly endless upward spiral. The federal tax consequences of a state court decree invalidating a prior divorce are amply illustrated by several recent cases, the last three of which (including this case) were decided within a few weeks of each other.[1]

In *Borax*, the facts were substantially identical to the facts in the instant case, except that there the second wife was a party to the first wife's declaratory judgment action. The issues in *Boxax* were whether the taxpayer could file joint income tax returns with his second wife and whether he was entitled to deductions for "alimony" paid to his first wife.[2] The Second Circuit agreed with the taxpayer, stating, per Marshall, C.J. (now Justice) (349 F. 2d 670):

> "We hold, for purposes of these provisions of the federal tax statute, and within the meaning of these provisions, that for the years in dispute Ruth and Herman were divorced under a decree of divorce. The subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence under these provisions of the tax law.
>
> "This rule of validation tends to promote some measure of certainty and uniformity—important goals of the federal tax scheme; . . . The rule of validation leaves the mobile spouse with the power to obtain a divorce in a jurisdiction whose decrees might not be recognized in every other jurisdiction. Yet by depriving the determination of invalidity of any federal tax significance the rule of validation avoids a measure of unevenness and uncertainty: all those taxpayers who have obtained a divorce in a particular jurisdiction are treated the same, regardless of whether the spouse against whom the decree has been obtained is able to, and does, invoke the power of another jurisdiction to declare that divorce invalid."

[1] The other cases are *Estate of Borax* v. *Commissioner*, 349 F. 2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); *Wondsel* v. *Commissioner*, 350 F. 2d 339 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); *Estate of Spalding* v. *Commissioner*, — F. 2d — (2d Cir. 1976); *Estate of Steffke* v. *Commissioner*, — F. 2d — (7th Cir. 1976). We understand that a petition for a writ of certiorari was recently filed in the *Steffke* case.

[2] Under the 1939 Code, applicable in *Borax*, alimony payments were deductible only when incident to a decree of divorce.

The *Borax* decision was followed by *Wondsel* on similar facts. Both *Borax* and *Wondsel* were in accord with the only prior circuit case law in point, which was *Feinberg* v. *Commissioner*, 198 F. 2d 260 (3d Cir. 1952), in which the court held (198 F. 2d at 263):

> "The mere fact that the marital domicile of the parties did not recognize the Florida divorce does not render it a nullity for federal income tax purposes."

In *Spalding* (reproduced in Appendix C hereto), the estate tax question was formally raised for the first time.[3] There, the husband's *ex parte* divorce was invalidated by a New York court at a time when he was domiciled in New York, but he had the foresight to move to California, where he remarried and continued to reside. When he was predeceased by his second wife, the Second Circuit agreed that the marital deduction should have been allowed her estate, but in the process purported to distinguish the case both from *Borax* and from the instant case. For the following reasons, however, we submit that there is no valid basis for distinguishing among the cases.

[3] Petitioners understand that the issue was raised in the Borax estate, but there the Commissioner allowed a full marital deduction for amounts passing to the second spouse without litigating the issue.

In its decision in the instant case, the Second Circuit reasoned that *Borax* was concerned with the alimony provisions of the federal income tax laws which, in the court's view, permitted greater "flexibility" than § 2056, since under the 1954 Code, alimony payments became deductible by the husband and includible in the wife's income even without the requirement of a divorce. We respectfully disagree with this reasoning, but even assuming, *arguendo*, that greater flexibility exists with respect to the alimony provisions, the argument totally ignores that part of the *Borax* decision pertaining to the filing of joint returns by the taxpayer and his second wife, where the court observed that the legislative history to the Revenue Act of 1948 made clear that " 'a uniform construction' of all the provisions dealing with the determination of marital status was intended," (349 F. 2d at 675), and consequently determined that the taxpayer and his second wife were permitted to file joint returns as husband and wife under the applicable provisions of the Code.

We believe that it is totally inconsistent with the *Borax* decision, and more importantly with the legislative intent to apply a uniform construction of *all* provisions of the tax laws dealing with the determination of marital status, that a man and woman should be treated as husband and wife for income tax purposes during their joint lives, but that on the death of the first to die the survivor should not be deemed a "surviving spouse." If we accept the *Spalding* and *Goldwater* decisions in the Second Circuit as correct, then we would have a situation where Leo's Mexican divorce was sufficient to terminate his marriage to Gertrude for income tax purposes and if he had died in a state other than New York it would have been sufficient for estate tax purposes as well. If Lee had predeceased Leo, he would apparently be deemed her "surviving spouse" but unfortunately for his estate and for Lee, he had the misfortune to predecease Lee while living in the State of New York.

That such factors as domicile and order of death should determine an important federal tax issue is unthinkable. It is discriminatory and uneven, at best, and completely destroys any semblance of uniformity in the application of the federal tax laws.

To permit a judgment of an inferior court of the State of New York in a matter relating solely to the protection of Gertrude's property interests to be determinative of Lee's status as Leo's surviving spouse for federal estate tax purposes does violence to the entire scheme of taxation in this country. "[T]he revenue laws are to be construed in the light of their general purpose to establish a nation-wide scheme of taxation uniform in its application." *U.S.* v. *Pelzer*, 312 U.S. 399,402 (1941). A state "cannot by its decisions and laws governing questions of which it has final say, also decide issues of federal tax law." *Commissioner* v. *Tower*, 327 U.S. 280, 288 (1946). Otherwise "federal tax legislation would be the victim of conflicting state decisions on matters relating to local concerns and quite unrelated to the single uniform purpose of federal taxation" *Estate of Rogers* v. *Commissioner*, 320 U.S. 410, 414 (1943). "Congress establishes its own criteria and the state law may control only when the federal taxing act, by express language or necessary implication, makes its operations dependent upon state law." *Lyeth* v. *Hoey*, 305 U.S. 188, 194 (1938).

The *Borax* court apparently recognized these principles but the Second Circuit now seeks to limit their application to income tax cases. However, the privileges afforded married couples pervade all areas of taxation: income, estate and gift. It is clear from the legislative history that Congress intended that the same considerations should apply to the sections of the Code permitting the filing of joint returns by a "husband and wife" and allowing the

estate tax marital deduction for bequests to a "surviving spouse". This intent is fully demonstrated by the Senate Committee's statement that "With the repeal of the 1942 amendments your Committee recommends estate and gift tax splitting which is similar in its effects to the splitting of the income tax provided for in this bill." S. Rep. No. 1013, 80th Cong., 2d Sess., page 28, 1948-1 Cum. Bull. 305.

We believe that the Second Circuit also erred in relying on two factual distinctions between the instant case and *Spalding*, both of which we submit are inconsequential and do not merit any differences in federal estate tax treatment. Indeed, the distinctions which the court found controlling are the same factors which the court, in its earlier *Borax* decision, determined should not be permitted to alter the treatment of married couples for federal tax purposes.

In *Spalding*, the subject estate was that of the wife, who had never been previously married, while here the subject estate is the husband's. It appears that in the view of the Second Circuit, if the previously unmarried party predeceases the party whose prior divorce has been invalidated by a state court, their marriage will be sanctioned and the latter will be recognized as the surviving spouse of the former, since it is the estate of the "innocent" spouse which is involved.[4] On the other hand, if the previously married party predeceases his mate, the marriage is ineffective for federal estate tax purposes and the latter will not be deemed a surviving spouse.

Surely, the marital status for federal estate tax purposes of two parties claiming to be husband and wife

[4] The reverse of this argument would appear to be equally persuasive, since in the present case it is the "innocent" spouse whose status as "surviving spouse" is being determined. Moreover, as residuary beneficiary, she will, in effect, pay all estate taxes imposed upon her husband's estate.

should not be affected by the order of their deaths. Such a result is not only unreasonable, but the tax planning implications are positively lethal.

The other distinction relied upon by the Second Circuit was that in *Spalding*, the husband moved to California after his *ex parte* Nevada divorce had been invalidated by his then domiciliary state.[5]

A person's choice of domicile is an equally inappropriate test for determining his marital status for federal estate tax purposes. This was recognized in *Borax*, where, in discussing the Third Circuit's decision in *Feinberg* v. *Commissioner*, 198 F.2d 260 (3d Cir. 1952), the court stated that the Third Circuit

> "did not intend anything to turn on where the husband and the second wife were residing at the time of the declaration of invalidity of the divorce, nor should anything turn on it. If domicile and residence are to play any role in deciding whether the subsequent declaration of invalidity should be recognized, and we doubt whether they should, it would be the domicile of the first marriage and the domicile and residence of the first wife . . . that would be relevant." (349 F.2d at 672).

Yet, under the *Spalding* decision, the validity of the husband's Nevada divorce for estate tax purposes was determined not by the divorce proceedings themselves and not by the subsequent legal proceedings commenced by the

[5] In *Spalding*, the Second Circuit noted disapprovingly that the Tax Court had given effect to the New York declaratory judgment, a decree of the lowest court of original jurisdiction in the State of New York, in a case where all interested parties were before the court. The court's disapproval apparently does not extend to the New York decree in *Goldwater*, where Lee, an indispensable party, was not joined.

first wife, but by the husband's decision to move to Californit *after* termination of all applicable judicial proceedings. The effect of the *Spalding* and *Goldwater* decisions is that the validity of a divorce for estate tax purposes may have absolutely nothing to do with the circumstances under which it was obtained. Instead, we must wait to see how the divorcing party comports himself after the divorce.

In the instant case, had Leo had the foresight to remain in Connecticut after his marriage to Lee, the estate tax marital deduction would have been preserved. While it is not at all uncommon for businesses to relocate their corporate domiciles on the basis of differences in state taxation, there is no reason why married couples should be compelled to go domicile-shopping in order to obtain equality of federal estate tax treatment. It was to avoid just such patent inconsistencies that the Second Circuit originally adopted the *Borax* rule of validation, which we believe should be equally applicable to all federal tax matters, whether they be income, estate or gift. Unfortunately, the clear logic of the *Borax* decision has now been compromised and we believe that the intervention of this court is essential to the preservation of a uniform and equitable system of determining marital status for federal tax purposes.

2. The Second Circuit Decided an Important State Question in a Manner in Conflict With Applicable State Law.

The threshold question before the court of appeals was whether or not Gertrude's New York declaratory judgment was itself invalid because of Gertrude's failure to join Lee as a party to that action. While acknowledging the general rule under New York law that the second spouse is an indispensable party to a declaratory judgment action by the first spouse, the Second Circuit determined that the

rule did not apply in the instant case because Leo did not contest Gertrude's cause of action for a declaratory judgment. Inasmuch as the declaratory judgment in a matrimonial matter purports to affect all interested parties—including the second spouse—we believe that the Second Circuit's decision is not only incorrect, but amounts to a denial of due process of law and should not be permitted to stand.

The general rule was enunciated by the Court of Appeals of New York in *Manhattan Storage and Warehouse Co.* v. *Movers & Warehousemen's Association of Greater New York, Inc.*, 289 N.Y. 82, 88, 43 N.E. 2d 820 (1942) as follows:

> "An action for a declaration of 'rights and other legal relations' in accordance with section 473 of the Civil Practice Act [now section 3001 of the Civil Practice Law and Rules] serves a legitimate purpose where all persons who are interested in or might be affected by the enforcement of such 'rights and other legal relations' and who might question in a court the existence and scope of such rights, are parties to the action and have opportunity to be heard. As to persons who are not parties a declaratory judgment would be a mere academic pronouncement without juridical consequence, but which might be embarrassing if attempt is made thereafter to enforce these rights in legal proceedings to which they are parties. A court may, and ordinarily must, refuse to render a declaratory judgment in such case. Post v. Metropolitan Casualty Ins. Co., 227 App. Div. 156, 237 N.Y.S. 64."

The New York courts have uniformly and without exception applied the foregoing rule to matrimonial matters. In *Cominos* v. *Cominos*, 23 A.D. 2d 769, 258 N.Y.S.

2d 545 (2d Dept. 1965), *appeal dismissed* 16 N.Y. 2d 1074, 266 N.Y.S. 2d 393 (1965), the plaintiff had been granted a judgment declaring the invalidity of a Mexican divorce obtained by the defendant and further declaring the plaintiff to be the lawful wife of the defendant. The judgment was unanimously reversed by the Appellate Division of the Supreme Court, which ordered a new trial, stating:

> "Prior to the new trial, plaintiff is directed to bring in as a party defendant the woman whom defendant claims to have married in Greece on January 27, 1963, and with whom he presently resides in New York. She is an indispensable party in this action; without her no effective judgment may be rendered (Varrichio v. Varrichio, 269 App. Div. 678, 53 N.Y.S. 2d 326; Bard v. Bard, 16 A.D. 2d 801, 228 N.Y.S. 2d 294; Williams v. Williams 17 A.D. 2d 958; 234 N.Y.S. 2d 103; Lauricella v. Lauricella, 13 Misc. 2d 799, 178 N.Y.S. 2d 559)."

See also *Bard* v. *Bard*, 16 A.D. 2d 801, 228 N.Y.S. 2d 294 (2d Dept. 1962).

We believe that the Second Circuit completely missed the entire thrust of the New York cases in determining that the general rule did not apply here. Indeed, if the absent second spouse is an indispensable party in an action which is vigorously contested by the defendant spouse, it follows *a fortiori* that where the defendant spouse does not contest the action, his second spouse is palpably an indispensable party, because her rights are plainly involved and no other party is seeking to vindicate those rights. Lee could not lawfully be deprived of her right to participate in Gertrude's declaratory judgment action and because she was not joined as a party the judgment obtained by Gertrude can be viewed as no more than an "academic pronouncement without juridical consequence." *Manhattan Storage and Warehouse Co.* v. *Movers & Warehousemen's Association of Greater New York, Inc., supra.*

Assuming that we have correctly interpreted the New York law as requiring Lee's joinder as a defendant in Gertrude's declaratory judgment action, then it is not even necessary that the court agree that the *Borax* rule is applicable to estate tax cases in order to support a determination favorable to the taxpayer. Even Judge Friendly, who dissented from the majority opinion in *Borax*, acknowledged that it would be inappropriate for the federal courts to involve themselves in determinations of local law relating to marital status in the absence of a binding judgment of an appropriate court, when he stated:

> "I agree Congress did not intend that the Commissioner in making tax determinations revolving around marital status, or the courts in passing upon them, should set themselves up as domestic relations tribunals. Hence I would join with the majority if the Mexican divorce stood unimpeached, even though we would have every reason to believe a New York Court would have annulled it at [the first wife's] request. . . ." (349 F.2d at 676).

Judge Friendly's statement is in accord with the Commissioner's view as expressed in G.C.M. 25250, 1947-2 Cum. Bull. 32, as modified by Rev. Rul. 67-442, 1967-2 Cum. Bull. 65, in which it was stated:

> "The Internal Revenue Service generally will not question for Federal income tax purposes the validity of any divorce decree until a court of competent jurisdiction declares the divorce to be invalid."

The New York court which granted Gertrude's request for a declaratory judgment was not a court of competent jurisdiction and there was no basis on which the Internal Revenue Service could legitimately challenge Lee's status as Leo's surviving spouse.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this court grant a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

Respectfully submitted,

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September, 1976

APPENDIX A

Opinion of United States Court of Appeals of June 29, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 876—September Term 1975

Argued May 5, 1976 Decided June 29, 1976

Docket No. 75-4277

ESTATE OF LEO J. GOLDWATER, Deceased, IRVING D. LIPKOWITZ, and LEE J. GOLDWATER, Executors,

Petitioners-Appellants,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before HAYS and MULLIGAN, Circuit Judges, and PALMIERI, District Judge.*

Appeal from an opinion of the United States Tax Court, 64 T.C. 540 (1975), disallowing an estate-tax marital deduction under 26 U.S.C. § 2056 because of a finding that decedent's second wife was not his "surviving spouse" for purposes of that section.

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* Of the United States District Court, Southern District of New York, sitting by designation.

Opinion of United States Court of Appeals of June 29, 1976

Affirmed.

IRVING D. LIPKOWITZ, New York, New York (Lipkowitz & Plaut, New York, New York, Roy Plaut, Peter Jason, of Counsel), for Petitioners-Appellants.

WILLIAM S. ESTABROOK, III, Attorney, Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Washington, D.C., Gilbert E. Andrews, Elmer J. Kelsey, Attorneys, Tax Division, Department of Justice, Washington, D.C., of Counsel), for Respondent-Appellee.

United States Court of Appeals, Second Circuit

Filed June 29, 1976

A. David Fusaro, Clerk

MULLIGAN, *Circuit Judge:*

This appeal presents this court with the problem of determining who is the "surviving spouse" of the decedent Leo J. Goldwater for purposes of the estate-tax marital deduction authorized by the Internal Revenue Code of 1954, 26 U.S.C. § 2056.[1]

The facts have been stipulated and are as follows: On June 20, 1946 Leo married his first wife Gertrude in New York City, where they resided as man and wife until about June 1955.[2] In December 1956 Gertrude was awarded a final decree of separation from Leo by the New York State Supreme Court, New York County. On March 20, 1958, Leo obtained a Mexican decree of divorce from Gertrude, without an appearance by her.

Opinion of United States Court of Appeals of June 29, 1976

On October 16, 1958, Gertrude commenced an action against Leo in the New York State Supreme Court, based on two causes of action: the first was for a declaratory judgment decreeing the invalidity of the Mexican divorce, and the second sought permanently to enjoin Leo from remarrying, in New York or elsewhere. In addition, Gertrude made a successful motion for a temporary injunction against Leo's remarriage during the pendency of the action. Leo appealed from the granting of the temporary injunction and from the denial of his own cross-motion in the trial court to strike the second cause of action (seeking a permanent injunction against his remarriage). On December 9, 1958, the New York Supreme Court, Appellate Division, First Department issued an opinion reversing the order denying Leo's cross-motion to dismiss the second cause of action, and vacating the temporary injunction against remarriage. *Goldwater* v. *Goldwater*, 6 App. Div. 2d 561, 180 N.Y.S. 2d 383. The court noted that Leo's "answering affidavit admits the invalidity of his Mexican divorce and asserts that he will not oppose plaintiff's [Gertrude's] action for a declaratory judgment." 180 N.Y.S. 2d at 384.

Freed of the injunction against his remarriage, on the very same day that the Appellate Division handed down its decision Leo married "wife" number two, Lee, in Connecticut. At all times thereafter and up until his death, Leo resided with Lee as man and wife in New York.

Thereafter, on February 17, 1959, the New York Supreme Court issued a declaratory judgment in the action instituted by Gertrude. *Inter alia* it declared and adjudged:

> —that the Mexican divorce of Gertrude and Leo "was and is fraudulent, null, void and of no force and effect whatsoever;"

—that the alleged marriage of Leo and Lee was likewise null and void;

—"[t]hat the plaintiff Gertrude B. Goldwater is, and at all times since June 20, 1946 has been, the lawful wife of the defendant Leo J. Goldwater."

The second cause of action (for an injunction against Leo's remarriage) was dismissed. While both Gertrude and Leo appeared in this declaratory judgment action, second wife Lee was never joined as a defendant in that suit. No appeal was ever taken from this declaratory judgment and hence it has become final.

Leo died on February 21, 1968. His last will and testament, dated January 17, 1964, was admitted to probate in the Surrogate's Court, New York County, approximately one month after his demise. That will bequeathed to Lee an interest in property equal to or greater than fifty per cent of the value of the adjusted gross estate.[3]

On April 11, 1968, Gertrude filed a notice to take an elective share of Lee's estate pursuant to N.Y. E.P.T.L. (Estates, Powers and Trusts Law) § 5-1.1 ("Right of election by surviving spouse"). This claim was settled by Leo's executors approximately a year later for the amount of $205,000; the settlement was approved by the Surrogate's Court on April 25, 1969.

The estate-tax return for Leo's estate claimed a full marital deduction of $395,242.17, representing the fifty percent of the adjusted gross estate which was left to Lee. By notice of deficiency the I.R.S. allowed a marital deduction of only $206,103.26, the amount left to Gertrude,[4] since, according to the I.R.S., "Lee J. Goldwater does not qualify as the surviving spouse within the meaning of Section 2056. . . ." Thus $189,138.91 of the claimed marital deduction was disallowed, resulting in an asserted deficiency in the estate tax of $73,284.86.

Leo's executors petitioned the Tax Court for a review of the claimed deficiency. In an opinion by Judge Irene F. Scott filed on July 8, 1975, which is reported at 64 T.C. 540, that court found in favor of the I.R.S., since it concluded "that Gertrude and not Lee was decedent's 'surviving spouse' within the meaning of section 2056." In so finding the court relied heavily on the New York court's declaratory decision which held that Gertrude, and not Lee, was Leo's lawful spouse.

Pursuant to that opinion the Tax Court found a deficiency of $51,709.19. This appeal followed.

We affirm the decision of the Tax Court. It seems clear that Gertrude and not Lee was Leo's spouse at the time of his death. Leo and Gertrude were married and resided in the State of New York; a New York State court found Leo's subsequent Mexican divorce to be "fraudulent, null, void and of no force and effect whatsoever," and in fact Leo admitted as much in his affidavit in the proceeding. Although Leo then married Lee in Connecticut, he at all times thereafter resided with her in New York. He died a resident of New York and his will was offered for probate in the New York Surrogate's Court. Under these facts the New York decree must be respected and Gertrude recognized as his surviving spouse.

This court was recently faced with a similar question in *Estate of Spalding* v. *CIR*, slip op. 4241 (2d Cir. June 18, 1976), but the facts in that case are clearly distinguishable from those presented here. In *Spalding*, Charles and Elizabeth were married in Pennsylvania, and thereafter resided in Connecticut until Charles moved to New York leaving Elizabeth in Connecticut. Charles then obtained a Nevada divorce serving Elizabeth in Vermont. The New York Supreme Court then declared that the Nevada divorce

was void. Charles thereupon married Amy in California where they continued to reside until Amy's death in that state. Amy's last will and testament was offered for probate in California. We held in *Spalding* that Amy's estate was entitled to the marital deduction since Charles was her "surviving spouse" under section 2056(a). In reaching that conclusion Judge Moore in his opinion pointed out that the Tax Court in making a contrary determination had relied upon its decisions in *Estate of Wesley A. Steffke*, 64 T.C. 530 (1975) (now on appeal in the Seventh Circuit) and *Estate of Leo J. Goldwater*, 64 T.C. 540 (1975) (this appeal). In distinguishing those cases Judge Moore stated that they had held that "where a prior divorce had been ruled invalid by *a court of the state where the decedent's estate was being administered*, the 'surviving spouse' requirement of § 2056(a) was not satisfied." Id. at 4245 (emphasis in original). In *Spalding*, as Judge Moore indicated, it was Amy's estate which was being administered and "[i]t is her property and her tax with which he [the Commissioner] is dealing." Id. at 4247. Here of course it is Leo's estate which is at issue; it was administered by the State of New York where he was domiciled and where a court of that state had held his divorce and "remarriage" to Lee to be invalid and of no force and effect. We consider that there is no alternative but to follow the law of New York and hold that Gertrude is his "surviving spouse" and that Lee does not qualify as such within the meaning of section 2056.

Appellant argues that our holding in *Estate of Borax* v. *CIR*, 349 F.2d 666 (2d Cir. 1965) (2-1, Friendly, *C.J.*, dissenting), cert. denied, 383 U.S. 935 (1966), followed in *Wondsel* v. *CIR*, 350 F.2d 339 (2d Cir. 1965) compels the holding here that Lee must be regarded as Leo's surviving spouse. However, *Borax* was concerned with the provi-

sions of the federal income tax law concerning the deductibility of alimony payments. The court carefully so limited its holding: "We hold, *for purposes of these provisions* [26 U.S.C. §§ 71, 215] of the federal tax statute, and *within the meaning of these provisions*, that for the years in dispute Ruth [the first wife] and Herman were divorced under a decree of divorce. The subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence *under these provisions of the tax law.*" 349 F.2d at 670 (emphasis added).

The court also noted that the 1954 Tax Code afforded the same tax treatment to support payments where the husband and wife were separated under a written separation agreement, as when they were formally divorced. Hence, "[i]f support payments are includible in the gross income of the wife and deductible by the husband when the parties are voluntarily separated, the same treatment should obtain when the husband and wife are 'divorced' in the sense in which Ruth and Herman were divorced—they ceased living together as husband and wife, they lived separately, and one party had obtained a decree dissolving the marital status, although the other had the decree declared 'invalid' by a court of another jurisdiction." Id. at 670-71.

For estate tax purposes, in determining the surviving spouse, there is no comparable flexibility in the provisions of section 2056. Judge Moore has candidly stated in his opinion in *Spalding* (slip op. at 4246) that *Borax* and *Wondsel* have been criticized by legal scholars. See, e.g., Spolter, Invalid Divorce Decrees, 24 Tax L. Rev. 163 (1969); Case Note, 40 N.Y.U. L. Rev. 992 (1965). Whether or not *Borax* was properly decided and whether it promotes uniformity or cavalierly ignores local law, is not now in issue. As we have indicated, *Borax* explicitly limits its

holding to the income tax issue there involved and does not purport to set forth a universal rule of tax code construction.

Appellant urges that even if *Boraæ* is not binding, the New York declaratory judgment is invalid since Lee was an indispensable party who was not joined as a defendant. The New York cases relied upon and those we have discovered are not in point. In all of these cases [8] it appears that the defendant spouse contested the judgment and asserted the validity of the divorce. Here, on the contrary, Leo by affidavit conceded that the Mexican decree he obtained was invalid. The marital relationship subsisting between Leo and Gertrude could only be impugned by a valid divorce and not by a subsequent relationship between Leo and Lee. See *Somberg* v. *Somberg*, 263 N.Y. 1, 188 N.E. 137 (1933). There is nothing in the record before us to give any basis for questioning the finding of the New York court that the Mexican divorce decree was a nullity. If Leo conceded this in the New York action, we cannot imagine what contribution Lee could have made to that litigation. We have not yet reached the stage where a subsequent "marriage" destroys the marital rights of the first wife without an intervening valid dissolution of the marital status.

We therefore affirm the decision of the Tax Court.

FOOTNOTES

[1] That section reads in pertinent part:

> (a) Allowance of marital deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

[2] Both Gertrude and Leo were New York residents from the time of their marriage until the time of his death on February 21, 1968.

[3] Obviously this was done to qualify for the maximum possible estate-tax marital deduction. 26 U.S.C. § 2056(c)(1).

[4] The $205,000.00 settlement plus a life insurance policy of $1,103.26 which named Gertrude as beneficiary.

[5] E.g., *Cominos* v. *Cominos*, 23 App. Div. 2d 769, 258 N.Y.S. 2d 545 (2d Dep't), appeal dismissed, 16 N.Y. 2d 1074, 213 N.E. 2d 687, 266 N.Y.S. 2d 393 (1965); *Bard* v. *Bard*, 16 App. Div. 2d 801, 228 N.Y.S. 2d 294 (2d Dep't 1962); *Varrichio* v. *Varrichio*, 269 App. Div. 678, 53 N.Y.S. 2d 326 (2d Dep't), leave to appeal to the Court of Appeals denied, 56 N.Y.S. 2d 527 (2d Dep't 1945); *Lauricella* v. *Lauricella*, 14 Misc. 2d 625, 178 N.Y.S. 2d 561 (Sup. Ct. 1958).

APPENDIX B

Opinion of United States Tax Court of July 8, 1975

64 T. C. No. 51

UNITED STATES TAX COURT

Docket No. 5864-72 Filed July 8, 1975.

ESTATE OF LEO J. GOLDWATER, Deceased, IRVING D. LIPKOWITZ and LEE J. GOLDWATER, Executors,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Where the Supreme Court of New York, County of New York had issued a declaratory judgment holding a Mexican divorce obtained by a husband invalid and that the wife he attempted to divorce was his legal wife and this judgment was outstanding unchallenged at the date of the husband's death, the wife he attempted to divorce is his surviving spouse within the meaning of section 2056, I.R.C. 1954, and not the person he purported to marry after the Mexican divorce decree was entered.

Irving D. Lipkowitz, Roy Plaut, and *Peter Jason,* for the petitioners.

Kimball K. Ross and *David N. Brodsky,* for the respondent.

Opinion of United States Tax Court of July 8, 1975

OPINION

SCOTT, *Judge:* Respondent determined a deficiency in the estate tax of the estate of Leo J. Goldwater in the amount of $73,284.86. Some of the issues raised by the pleadings have been disposed of by agreement of the parties leaving for decision whether Lee J. Goldwater is the surviving spouse of Leo J. Goldwater within the meaning of section 2056, I.R.C. 1954.[1]

All of the facts have been stipulated and are found accordingly.

Irving D. Lipkowitz and Lee J. Goldwater are the executors of the estate of Leo J. Goldwater (hereinafter referred to as the decedent). The address of both executors at the time of the filing of the petition in this case was New York, New York. The estate tax return for decedent's estate was filed with the district director of internal revenue in New York, New York.

Decedent was married to Gertrude B. Goldwater (hereinafter Gertrude) on June 20, 1946, in New York, New York, where they lived together as husband and wife until about June 1955.

From the time of his marriage to Gertrude until the time of his death, decedent and Gertrude were both residents of New York, New York and the sole place of business of decedent was within the City, County and State of New York.

In December 1956, Gertrude was awarded a final decree of separation from decedent by the Supreme Court of the State of New York, County of New York.

[1] All section references are to the Internal Revenue Code of 1954, unless otherwise noted.

On March 20, 1958, decedent procured a decree of divorce from Gertrude in the State of Tlaxcala, Republic of Mexico. This decree states in part as follows:

> —JUDGEMENT: Apizaco, State of Tlaxcala, March 20th, 1958
>
> —Upon consideration of the proceedings in the present divorce action or purpose of final judgment, it appears:
>
> —FIRST: The required petition was presented, and having satisfied all legal requisites, the Plaintiff accepted the jurisdiction and authority of this Court, and as prescribed by the Civil Code, complying with the requirements of residence as proven with Certificate Number: 1195784, issued to him by the Department of the Interior; instituted an action for necessary divorce against the Defendant, with the assistance of the duly admitted Attorney by this Court, declaring as grounds for divorce the Incompatibility of Temperaments as prescribed by Article 206, Section VII, of the Civil Code, Chapter of Divorce; that the parties were married in the City of New York, State of New York, United States of America, on June 20th, 1946,—as evidenced in compliance with Law; that there were no issues born from said matrimony; further, also petitioning in the complaint that the Defendant be summoned in compliance with Law, and that upon having satisfied all legal requisites a judgment be entered declaring the aforesaid matrimony dissolved. The complaint was admitted and the Defendant was ordered to be summoned as provided by Law, and the legal term expired without the Defendant having filed an answer. The statements in the complaint were then presumed to have been admitted, and was introduced during the proceedings satisfactory evidence that the Defendant became personally served and was given an opportunity to defend, exhibiting [sic] the affidavit of service duly sworn to that effect, and executed by Deputy Sheriff of the City of New York, County and State of New York, dated March 14th, 1958, in full compliance with Law; • • •
>
> • • •
>
> —NOW THEREFORE: Based upon the foregoing and in Articles 560, 561, 564, 566, 567, 571, also 75, and other provisions of the Code of Civil Procedure it is adjudged:
>
> —FIRST: The marriage entered into between LEO J. GOLDWATER, and GERTRUDE B. GOLDWATER [sic], on June 20th, 1946, in the City of New York, State of New York, U.S.A. is now legally dissolved leaving both parties free to enter into new nuptials, according to Article 205, of the Civil Code.

On October 16, 1958, Gertrude began an action against decedent in the Supreme Court of the State of New York, County of New York, based upon two causes of action, the first for a declaratory judgment to declare invalid the decree of divorce obtained by decedent in Mexico, and the second to permanently restrain and enjoin decedent from remarrying in New York State or elsewhere. In the prayer of her complaint Gertrude asked that the Court restrain decedent from remarrying during the pendency of the action. Decedent made a cross-motion to dismiss the second cause of action in the complaint (seeking a permanent injunction against decedent's remarrying) for legal insufficiency. Gertrude's motion for a temporary injunction was

granted and decedent's cross-motion to dismiss the second cause of action was denied by the Special Term of the Supreme Court, New York County, and decedent appealed from both orders to the Appellate Division of the Supreme Court, First Department. On December 9, 1958, the Appellate Division unanimously (1) reversed the order denying decedent's cross-motion and granted such cross-motion to dismiss the second cause of action; and (2) modified the order granting Gertrude's motion for a temporary injunction, denied the motion and affirmed only such part of the order as had awarded Gertrude counsel fees.

Decedent did not contest Gertrude's first cause of action for a declaratory judgment, and on February 19, 1959, the Supreme Court of the State of New York, County of New York, rendered a declaratory judgment in Gertrude's action which provided:

> 1. That the alleged divorce procured by the defendant Leo J. Goldwater from the plaintiff Gertrude B. Goldwater, in Tlaxcala, Mexico, on or about March 20, 1958, was and is fraudulent, null, void and of no force and effect whatsoever.
>
> 2. That the alleged marriage of the defendant Leo J. Goldwater to Mrs. Lee F. Jablow in December, 1958, in the State of Connecticut, was and is null, void and of no force and effect whatsoever.
>
> 3. That the plaintiff Gertrude B. Goldwater is, and at all times since June 20, 1946 has been, the lawful wife of the defendant Leo J. Goldwater.
>
> 4. That the defendant Leo J. Goldwater and Mrs. Lee F. Jablow are not and never have been husband and wife.

Lee F. Jablow (Lee) referred to in the decree is Lee J. Goldwater, one of the executors of decedent's estate.

On December 9, 1958, decedent and Lee were purportedly joined in marriage in Connecticut with a Justice of the Peace officiating. On the certificate of marriage recorded in the State of Connecticut, both decedent's residence and Lee's residence is shown as New York City, New York. At all times after December 9, 1958, until decedent's death, decedent and Lee resided together as husband and wife in New York.

Decedent died on February 21, 1968. His last will and testament, dated January 17, 1964, was duly admitted to probate in the Surrogate's Court in New York County, New York, New York, on March 19, 1968, and letters testamentary were issued on that date to Lee J. Goldwater and Irving D. Lipkowitz, the petitioners herein who are still qualified and acting as such executors.

In decedent's last will and testament he devised and bequeathed to Lee an interest in property equal to or greater than 50 percent of the value of his adjusted gross estate.

On April 11, 1968, Gertrude served and filed a notice to take an elective share of Leo's estate pursuant to section 5-1.1 of the New York Estates, Powers and Trust Laws.[2] By agreement dated April 4, 1969, between Gertrude and decedent's executors, the petitioners herein, Gertrude's

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[2] This section provides for a "Right of election by surviving spouse" against the will except in specified circumstances, one of which is when in case of wills executed prior to August 31, 1966, the surviving spouse is devised $2,500 and a testamentary trust is created leaving the surviving spouse a life estate in an amount which equals or exceeds the surviving spouse's elective share.

claim was compromised and settled in the amount of $205,000.[3] The agreement was approved by decree of the Surrogate's Court, New York County, New York, New York, on April 25, 1969. The sum of $206,103.26 which passed from decedent's estate to Gertrude consisted of this $205,000 together with the proceeds of an insurance policy on decedent's life in the amount of $1,103.26, of which Gertrude was the beneficiary.

The estate tax return for decedent's estate, filed May 20, 1969, showed an estate tax due in the amount of $84,889.74 and this was paid. On this return, a full marital deduction of $395,242.17 representing 50 percent of the adjusted gross estate (as computed on the return) was claimed on the basis that an amount in excess of this sum was passed to Lee.

Respondent in his notice of deficiency disallowed $189,138.91 of the claimed marital deduction with the explanation that a marital deduction in the amount of $206,103.26, representing the value of the interest in decedent's property which passed to Gertrude was allowable. Respondent in his notice stated "that Lee J. Goldwater does not qualify as the surviving spouse within the meaning of Section 2056 * * *."

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[3] Leo's will contained a provision that if his former wife Gertrude would be entitled to elect as a surviving spouse absent provision for her in his will that he bequeathes to her $2,500 absolutely and establishes a trust of an amount equal to the excess between $2,500 and her intestate share with the income payable to her for life and on her death the principal remaining in the hands of the trustees to become part of the residual estate.

Section 2056(a),[4] with specified limitations, exempts from estate tax the value of a decedent's adjusted gross estate (not to exceed 50 percent thereof, section 2056 (c)(1)) which passes from the decedent to the surviving spouse. This provision of the statute, first enacted in 1948, was intended to "produce approximate geographical equality" in estate tax and "to equate the decedent in the common-law State with the decedent in the community-property State." H. Rept. No. 1274, to accompany H.R. 4790, 80th Cong., 2d Sess. (1948), 1948-1 C.B. 241, 261; S. Rept. No. 1013, to accompany H.R. 4790, 80th Cong., 2d Sess. (1948), 1948-1 C.B. 285, 305.

In a community property state, upon one spouse's death, the surviving spouse has title to one-half of the community property and therefore this one-half is not a part of the deceased's estate subject to estate tax. For this reason the statute, section 2056(c)(2)(B), provides special rules in case of community property which in general effect allow the marital deduction only with respect to the separate property of the decedent passing to the surviving spouse.

Neither the statute nor the regulations define the term "surviving spouse." Except in unusual circumstances a problem will not arise as to the definition of this term. However, in the circumstances present in this case, it is necessary to determine whether Lee is the decedent's surviving spouse, as petitioners contend, or Gertrude is decedent's surviving spouse, as respondent contended.

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[4] SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) Allowance of Marital Deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Respondent relies on the judgment of the New York Supreme Court, holding the Mexican divorce obtained by decedent null and void and that Gertrude is and at all times since their marriage has been the lawful wife of decedent in support of his position. Apparently, petitioner does not contend that under the holding of the New York Court, Lee rather than Gertrude was decedent's legal wife at the time of his death but rather contends that under the holding of the United States Court of Appeals for the Second Circuit, to which an appeal in this case would lie, *Borax' Estate* v. *Commissioner,* 349 F. 2d 666 (C.A. 2, 1965) reversing 40 T.C. 1001 (1963), certiorari denied 383 U.S. 935 (1966); and *Wondsel* v. *Commissioner,* 350 F. 2d 339 (C.A. 2, 1965) reversing a Memorandum Opinion of this Court, certiorari denied 383 U.S. 935 (1966), the determination of marital status for Federal tax purposes is not controlled by a decision with respect to that status by a court of the state in which the parties reside or are domiciled.

Petitioners argue that under our holding in *Jack E. Golsen,* 54 T.C. 742 (1970), the *Borax* and *Wondsel* cases control the result which should be reached in this case. However, petitioners suggest in their argument that Gertrude's declaratory judgment is of "questionable validity" since Lee was not joined as a party.

In our view there is no question that under New York law the declaratory judgment obtained by Gertrude is a valid judgment that the divorce obtained by the decedent in Mexico is null and void and Gertrude is the decedent's lawful wife. However, since a question has been raised by petitioners as to this judgment, we will discuss this suggested or intimated point of petitioners' before proceeding to discuss the issues primarily argued by the parties in this case.

The New York law is clear that where an action for a declaratory judgment as to marital status is commenced after the purported remarriage of one party, that party's purported husband or wife is an indispensable party. *Williams* v. *Williams,* 17 App. Div. 2d 958, 234 N.Y.S. 2d 103, 105 (2nd Dept. 1962), and cases there cited. However, where prior to the purported remarriage the party defendant in the declaratory judgment action has admitted the invalidity of the purported divorce he obtained and asserted that he would not oppose the action for a declaratory judgment, as had decedent here, the substantive issue is disposed of prior to any purported remarriage of that party, and no trial of the substantive issue is required. Since there was no trial to be held because of decedent's concessions at the December 9, 1958, hearing, Lee was not an indispensable party, the marriage ceremony between her and decedent not having taken place when the December 9, 1958, opinion setting forth decedent's concessions was rendered. See *Bard* v. *Bard,* 16 App. Div. 2d 801, 228 N.Y.S. 2d 294 (2nd Dept. 1962). The opinion of the Court in *Goldwater* v. *Goldwater,* 6 App. Div. 2d 561, 180 N.Y.S. 2d 383 (1st Dept. 1958), which was entered on December 9, 1958, and formed the basis for the orders entered that day reversing the orders of the trial court temporarily enjoining decedent's remarriage and refusing to dismiss Gertrude's action for a permanent injunction against his remarrying specifically stated (at 384):

> Defendant's answering affidavit admits the invalidity of his Mexican divorce and asserts that he will not oppose plaintiff's action for a declaratory judgment.

At a minimum under these circumstances the decree entered by the New York Court is presumptively valid.

See *Williams* v. *Williams, supra* at 103-104. On the facts here we conclude that the decree of the New York court establishes that decedent and Gertrude were under New York law husband and wife at the date of decedent's death. In circumstances similar to those here present, the New York courts have held the wife from whom the husband obtained an invalid divorce to be entitled to elect to take as surviving spouse under the New York statutes. *In re Deckert's Will,* 141 N.Y.S. 2d 855 (King's County Surr. Ct. 1955).

In the case of *In re Will of Bock,* 70 Misc. 2d 470, 333 N.Y.S. 2d 801 (Erie County Surr. Ct. 1972), the court stated in part (at 802-803):

> Subdivision (a)(1) of sec. 5-1.2 of the Estates Powers and Trusts Law (Disqualification as Surviving Spouse) provides, inter alia, that a surviving spouse is disqualified from exercising her right of election as provided in sec. 5-1.1 of the Estates Powers and Trusts Law where "a final decree or judgment of divorce, * * * recognized as valid under the law of this state, was in effect when the deceased spouse died."
>
> Clearly this section grants to the divorced spouse the right to contest the validity of such decree. The Surrogate is given jurisdiction to determine whether a divorce decree "recognized as valid under the law of this state, was in effect when the deceased spouse died." It is by reason of this jurisdiction that a divorced spouse must be cited in a probate proceeding. The rights accorded her under the above section must be protected.

If Gertrude had not previously obtained a judgment declaring decedent's Mexican divorce invalid and that she was his wife, she could have attacked the validity of the divorce decedent obtained in Mexico in the probate proceeding. However, where the invalidity of the divorce had, as here, been previously established by a declaratory judgment such an attack in the probate proceeding was unnecessary. Under New York law there was no divorce "recognized as valid" when decedent died.

While neither party suggests that under the facts of this case we need look to the law of any state other than New York, where both Gertrude and decedent were domiciled from the time of their marriage to the date of decedent's death, we point out that the judgment of the New York court would be entitled to full faith and credit in other states. *Sutton* v. *Leib,* 342 U.S. 402 (1952).

We turn now to the issue of whether having determined that Gertrude was decedent's wife under the New York law (which under the full faith and credit clause of the constitution would be accepted in other states) at the date of decedent's death we should conclude that she is his "surviving spouse" under section 2056 and, if in our view such is the proper interpretation of section 2056, whether the *Golsen* holding requires that we conclude under the *Borax* and *Wondsel* decisions of the Second Circuit that Lee is decedent's "surviving spouse" under section 2056.

Since section 2056 was enacted "to equate the decedent in the common-law State with the decedent in the community-property State," it seems to be clear that the Congressional intent was to look to state law to determine who is a decedent's surviving spouse under section 2056 at the date of his death. We recognize that a determination of the meaning of the words "surviving spouse" as

used in section 2056 is a question of construction of a Federal statute and not of state law. *Lyeth* v. *Hoey*, 305 U.S. 188, (1938). However, in construing the meaning of the statute we must determine whether the Congressional intent was that "surviving spouse" as used in section 2056 refers to the surviving spouse at the date of decedent's death under state law. Numerous cases have looked to state law to determine other questions arising under section 2056 such as whether a release executed by a widow is valid, see *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 463 (1967), or whether the interest passing to decedent's widow is a terminable interest under section 2056(b). See *In re Estate of Harry Fried*, 445 F. 2d 979 (C.A. 2, 1971), affirming 54 T.C. 805 (1970).

In our view, Gertrude and not Lee was decedent's "surviving spouse" within the meaning of section 2056. Gertrude's suit which was settled for $205,000 was for her elective share of decedent's estate as his widow. The settlement of the suit was an amount she received as decedent's widow or "surviving spouse" within the meaning of section 2056. See *Lyeth* v. *Hoey, supra.*

Petitioners argue that irrespective of our view of whether Gertrude or Lee is decedent's "surviving spouse" under section 2056, the issue is identical to the determination made by the Second Circuit in *Borax* and *Wondsel*, and under those decisions we are required to conclude in this case that Lee is the surviving spouse. *Jack E. Golsen, supra.*

In *Ruth Borax*, 40 T.C. 1001, 1007 (1963), reversed in *Borax' Estate* v. *Commissioner, supra*, in construing whether certain payments made under a separation agreement were includable in the wife's income and deductible by the husband as payments incident to a divorce, we stated in part:

> We recognize and are fully in accord with the principle that the Federal law will control when there is a question of the construction of a Federal statute, *Lyeth* v. *Hoey*, 305 U.S. 188 (1938), and that Federal tax statutes are not to be frustrated by State laws, *Commissioner* v. *Tower*, 327 U.S. 280 (1946). But here we do not look to State law to construe the Federal statute. The statute, as interpreted by the Federal courts, requires that the written instrument be incident to the decree of divorce or, in this case, the status of divorce. There being no body of Federal law from which we can determine whether the status of divorce existed, we must look elsewhere. This Court has often held that where the language of a Federal tax statute depends on the marriage status we will look to State law for that purpose. Marriage, its existence and dissolution, is particularly within the province of the States. *Marriner S. Eccles*, 19 T.C. 1049 (1953), affirmed per curiam 208 F. 2d 796 (C.A. 4, 1953); *Albert Gersten*, 28 T.C. 756 (1957), affirmed on this issue 267 F. 2d 195 (C.A. 9, 1959); *John J. Untermann*, 38 T.C. 93 (1962). The reason for looking to State law here is to aid in determining the status of divorce as required by the Federal statute; and we cannot see that doing so frustrates any tax policy of the Congress in this situation.

The Second Circuit, in reversing, concluded (349 F. 2d at 670):

> We hold, for purposes of these provisions of the federal tax statute, and within the meaning of these provisions, that for the years in dispute * * * [tax-

> payer] and Herman were divorced under a decree of divorce. The subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence *under these provisions of the tax law.* [Emphasis supplied.]

The Second Circuit explained its conclusions as follows (at 670-671):

> This rule of validation tends to promote some measure of certainty and uniformity—important goals of the federal tax scheme; see Commissioner v. Lester, 366 U.S. 299, 301, 81 S.Ct. 1343, 1345, 6 L.Ed.2d 306 (1961), declaring "that it was the intention of Congress, in enacting sec. 22(k) and sec. 23(u) of the [1939] Code, to eliminate the uncertain and inconsistent tax consequences resulting from the many variations in state law."
>
> • • •
>
> This interest in uniformity might not by itself justify a rule of validation, but there is an additional factor. The rule tends to further the "indicated congressional policy of placing the tax burden of all general marriage settlement payments on the party entitled to their enjoyment," Lerner v. Commissioner, 195 F.2d 296, 298 (2 Cir. 1952), and it does so without interfering with any other congressional tax policy. The requirement that the marital relationship be dissolved by a judicial decree of divorce (or legal separation) as opposed to being dissolved by having the parties cease living together as husband and wife is not expressive of any significant policy. This was amply revealed in 1954 when

> Congress afforded the same tax treatment to support payments where the husband and wife are voluntarily separated and there is a written separation agreement. See generally *Mavity* v. *Commissioner*, 341 F.2d 865, 870 (2d Cir. 1965). If support payments are includible in the gross income of the wife and deductible by the husband when the parties are voluntarily separated, the same treatment should obtain when the husband and wife are "divorced" in the sense in which • • • [taxpayer] and Herman were divorced—they ceased living together as husband and wife, they lived separately, and one party had obtained a decree dissolving the marital status, although the other had the decree declared "invalid" by a court of another jurisdiction.

In our view the policy considerations which led the Second Circuit to conclude for the purpose of the alimony provisions of the Revenue Code that a Mexican divorce which had been declared invalid in New York should be recognized are not applicable to the construction of the term "surviving spouse" under section 2056. The underlying concept of the *Borax* case that where parties to a marriage are separated the tax burden should be on the party entitled to the "enjoyment of the payments" has no application to section 2056.

The policy considerations underlying the enactment of section 2056 were totally different from those considered by the Second Circuit to underlie the enactment of the alimony provisions. The provisions of section 2056 are by necessary implication dependent upon the law of the state in which the decedent's estate is being administered. The question which often arises under section 2056 of the nature of the interest passing to the surviving spouse is resolved by

applying the appropriate state law. *Commissioner* v. *Estate of Bosch, supra.* The law of many states grants specific property rights such as dower or curtesy to the "surviving spouse" of a decedent. In New York, as well as many other states, a "surviving spouse" may elect to take against a will. In a community-property state the state law controls who is the spouse and who owns one-half of the community property when the other spouse dies. If we determine who is the "surviving spouse" under section 2056 other than by looking to state law, we frustrate the intent of Congress to "equate the decedent in the common-law State with the decedent in the community-property State." In our view the Congressional intent in enacting section 2056 was that the term "surviving spouse" refers to the same person who is the surviving spouse under the law of the state in which the decedent's estate is being administered. Such a construction promotes uniformity in the administration of the estate tax law by considering as the "surviving spouse" in all states the person who will inherit as the "surviving spouse". For the determination of the nature of property rights inherited by the "surviving spouse" we must look to state law and to consider a different person to be the "surviving spouse" for purposes of section 2056 than is considered the "surviving spouse" under state law would result in confusion as to the nature of the property interest inherited by the surviving spouse. The considerations underlying the enactment of section 2056 differ substantially from those underlying the enactment of the "alimony" provisions as set forth in the opinion of the Second Circuit in the *Borax* case. The rationale of the *Borax* case, the promotion of uniformity in the administration of the taxing statutes, is accomplished under section 2056 by looking to state law to determine who is the "surviving spouse".

We are aware that the *Borax* case also dealt with the right of the taxpayer and the person he contended was his "wife" to file a joint return. In concluding that a joint return was permissible the Second Circuit did not discuss the legislative history of the joint return provisions but rather in support of its conclusion stated (349 F.2d at 675):

> The Commissioner insists that for purposes of filing joint returns marital status must be determined in accordance with the law of the state of domicile, and that Herman and Hermine were not entitled to file a joint return because a court in the state of their domicile for the years in dispute, New York, had declared them not to be husband and wife. While there is much to be said against a rule resolving all conflicts in marital status in terms of the domicile of the parties, since it would attach important tax consequences to changing a home from state to state, and although the Commissioner has on occasion taken a contrary position, see Rev. Rul. 58-66, 1958 1-2 Cum. Bull. 60 (common law marriages), we do not pass on that broader issue here. The New York declaration of invalidity of the marriage between Herman and Hermine was predicated solely on the view that the Mexican divorce by Herman and Ruth was invalid; and it would make little sense for us to recognize the Mexican divorce for the purposes we did, and at the same time recognize a judgment which was predicated on a refusal to recognize that divorce. Cf. S.Rep. No. 1013, 80th Cong., 2d Sess. [1948], 2 U.S. Code Cong. & Ad. News, p. 1212, declaring that "a uniform construction" of all the provisions dealing with the determination of marital status, including those related to joint returns and "alimony and like payments," is intended.

From the above quotation we conclude that the *Borax* case in dealing with the joint return issue did not pass on an issue which is "squarely in point" with the issue here presented as to the meaning of the term "surviving spouse" as used in section 2056. The *Wondsel* case in the Second Circuit relied on the *Borax* case and contains no independent discussion of the legislative intent underlying the "alimony" and "joint return" provisions of the Revenue Code.

In our view since the decisions of the Second Circuit in the *Borax* and *Wondsel* cases are not "squarely in point" with the issue in the instant case, they are not controlling in this case. See and compare *Estate of Wesley A. Steffke*, 64 T.C. , and *Harold K. Lee*, 64 T.C. , filed this day. In this case we conclude that Gertrude and not Lee was decedent's "surviving spouse" within the meaning of section 2056 and therefore sustain respondent's determination that the marital deduction available to decedent's estate is the $206,103.26 which passed from the estate to Gertrude.

Because of the issues disposed of by the parties,

Decision will be entered

under Rule 155.

Reviewed by the Court.

APPENDIX C

Opinion of United States Court of Appeals
In Estate of Spalding* v. *Commissioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 755 September Term 1975

Argued March 18, 1976 Decided June 18, 1976

Docket No. 75-4248

ESTATE OF AMY ANN MCGINNIS SPALDING, Deceased,
CHARLES F. SPALDING, Executor,
Petitioner-Appellant,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before:

MOORE and FEINBERG, *Circuit Judges*, and WYZANSKI,* *District Judge*.

Appeal from a decision of the Tax Court, Tannenwald, *J.*, disallowing a marital deduction taken under Section 2056(a) of the Internal Revenue Code of 1954. The Court of Appeals reversed, holding that the estate was entitled

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* Honorable Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, sitting by designation.

to the deduction since the husband of the decedent was her "surviving spouse" within the meaning of Section 2056(a).

Reversed, and remanded to the Tax Court to consider appellant's claim to a deduction for attorneys' fees.

JAMES B. LEWIS, Esq., New York, N.Y., (Jose E. Trias; Paul, Weiss, Rifkind, Wharton & Garrison, of counsel) *for Petitioner-Appellant.*

WILLIAM S. ESTABROOK, III, Esq., Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Gilbert E. Andrews, Elmer J. Kelsey, Attorneys, Department of Justice, Tax Division) *for Respondent-Appellee.*

MOORE, *Circuit Judge:*

Estate of Amy Ann McGinnis Spalding, Deceased, Charles F. Spalding, Executor, Petitioner-Appellant, petitions this Court to review a decision of the United States Tax Court, Tannenwald, *J.*, finding a deficiency in estate tax due from petitioner in the amount of $415,121.45. The case was presented to the Tax Court upon a stipulation of facts agreed upon by the parties. The tax in question resulted from the Commissioner's disallowance of a claimed marital estate tax deduction[1] of $1,130,803.55 on the ground that Charles F. Spalding (Charles) and Amy Ann McGinnis Spalding (Amy) were not legally and validly married on the date of her death—hence Charles is not a "surviving spouse", and the estate is precluded from taking the deduction.

It is a curious anomaly of life that the status of holy matrimony should be decided by the taxing agencies of the United States; but anomalies are not new to the federal courts. And so here.

Charles and Elizabeth C. Spalding (Elizabeth) were married on May 4, 1945 in Haverford, Pennsylvania. Presumably the laws of Pennsylvania governed their matrimonial status until they moved to Connecticut, where they resided until November 1962, when apparently discord or an amicable agreement to disagree caused Charles to move to New York and Elizabeth to remain in Connecticut. On March 19, 1964 Charles obtained what might be called (at least in those days) an *ex parte* Nevada divorce, albeit Elizabeth was personally served in the State of Vermont. Thus far, only four (4) of our fifty (50) states are potentially involved.

Although living with Charles for reasons best known to them was not a model *modus vivendi*, Elizabeth did not wish to become unmarried—at least by a then-regarded renegade state whose procedural practices, *re* divorce, caused lifted eyebrows in more Victorian jurisdictions. A Justice of the Supreme Court of the State of New York on March 13, 1968 vindicated Elizabeth's matrimonial status—at least so far as New York was concerned. Putting Nevada in its proper place as not being "a Court of competent jurisdiction" according to New York standards, the Justice declared that, since 1945, Elizabeth was and is (but omitting the "and ever shall be") the lawful wife of Charles.

But court decrees (try as they will) cannot extinguish normal natural instincts and on May 11, 1968 Charles and Amy were married in California and thereupon became Mr. and Mrs. Charles Spalding. There is no issue raised as to any defect in the California marriage, such as no license obtained, no minister or clerk officiating, or no required fees paid. To the contrary, a certificate of marriage was issued.

Mr. and Mrs. Spalding continued to live in Hillsborough, California in a judicially-assumed reasonably happy state until interrupted by Amy's death on December 18, 1969, leaving a will wherein she expressed her wishes with respect to after-death disposition of her property—wishes which the courts throughout the ages, possibly out of respect for the dead, have professedly striven to honor.

As a lawful resident of California, Amy's will was duly probated on January 8, 1970 by the Superior Court of the State of California for the County of San Mateo. In her will, Amy devised her interest in their residence (California is a community property State), other articles and a portion of her residuary estate to Charles pursuant to a marital deduction provision.

All would have gone well and the California courts would have supervised the estate probably through to an accounting, but for the entry of the Commissioner of Internal Revenue into the picture. Somehow or other he had learned about the views of that New York judge with respect to Nevada divorces, and in complete disregard of the California situation, Amy's belief that she had a husband and the standing that Mr. and Mrs. Spalding must have had with friends and neighbors in the community, decreed, in effect, that Amy and Charles were living in sin and that Charles was not a "spouse" at all. The Commissioner concluded, not surprisingly, that the marital deduction claimed by the estate should be disallowed.

The Tax Court upheld the disallowance largely upon its consideration of § 2056(a) of the Internal Revenue Code of 1954 and the Tax Court's decision in two recent cases before it, *Estate of Wesley A. Steffke*, 64 T.C. 530, July 8, 1975, now on appeal to the Seventh Circuit, and *Estate of*

Leo J. Goldwater, 64 T.C. 540, July 8, 1975, now on appeal to this Circuit. According to the Tax Court, *Goldwater* and *Steffke* held that, where a prior divorce had been ruled invalid by *a court of the state where the decedents estate was being administered*, the "surviving spouse" requirement of § 2056(a) was not satisfied. Purporting to following this precedent, the Tax Court specifically rejected the applicability of two cases in this Circuit, *Borax' Estate* v. *Commissioner*, 349 F.2d 666 (1965), *cert. denied*, 383 U.S. 935 (1966) and *Wondsel* v. *Commissioner*, 350 F.2d 339 (1965), *cert. denied*, 383 U.S. 935 (1966).

The fact that California, the state of both the matrimony and the administration of the estate, had taken no action to invalidate the marriage of its citizens or to annul the marriage certificate issued in California, to the Tax Court did not constitute a "material distinction". Instead, that court chose to give constitutional sanctity to a decree of the lowest court of original jurisdiction in a State (New York) which had not been the State of the original marriage. However, the Tax Court came to the conclusion that California would have been required to surrender its jurisdiction over the persons and property of its own citizens and yield to a Justice of the New York Supreme Court for Westchester County—hence, Mr. and Mrs. Spalding were not lawfully husband and wife.

Thus, the courts have to face a conundrum of their own creation, *i.e.*, when is a spouse not a spouse. If the views of the Commissioner are accepted, by the signature of a judge of a court of original jurisdiction to a decree in New York, Charles will remain shackled to Elizabeth for the rest of his life and California would be powerless to view it otherwise. But, query, whether California, the state of

residence, the state of the marriage and the state of the probate, is so powerless? And, again, if Charles and Amy had been forty years younger and had had offspring, would the Commissioner have the power to brand them as illegitimate?

Fortunately—or more likely unfortunately—cases somewhat analogous are on the books. The slate is by no means clean. In this Circuit thus far are two decisions which on their own particular facts have attempted to achieve a degree of practical justice out of matrimonial tax difficulties. *Borax, supra* and *Wondsel, supra.* In *Borax* and *Wondsel,* this Court, in an income tax setting, applied a "rule of validity" to a remarriage which was followed by a judicial declaration of the invalidity of one of the spouses' prior divorces, with the consequence that payment by the husband to the first wife under a separation agreement were found to be "incident to * * * [a] divorce", within the meaning of § 71 of the Internal Revenue Code of 1954 (26 U.S.C.), and therefore deductible by the husband. We also held that since the divorce was valid, the subsequent marriage was also valid, for income tax purposes, so that the man and woman were "husband and wife", and entitled to file joint income tax returns, and claim dependency exemptions.

Both decisions have been criticized by professional scholars and the Commissioner says that he will pay no attention to them. The line of attack seems to be the rather wooden one that if some state decrees a divorce obtained in some other jurisdiction to be invalid, no state thereafter is free to exercise its own standards and judgment with respect thereto.

The Commissioner's attitude in this case is quite realistic. He says (in the Commissioner's Brief. p. 33): "In the context of the federal estate tax law, it is probably impossible to reach an equitable rule which will unquestionably comply with all jurisdictions' attitudes towards the validity of a particular marital state." (Very probably true but we can try in this particular instance.) The Commissioner then proceeds to say (quite accurately) "that generally the law of the decedent's domicile [here California], towards the validity of the marriage will prevail" and that this "is a sound and expedient solution to the many factual variations which may occur. . .".

The Commissioner looks only at Charles and the New York proceedings as to him. But for tax purposes, he should look at Amy. It is her property and her tax with which he is dealing. Charles, despite New York's opinion vis-a-vis the Charles-Elizabeth relationship, was Amy's husband. If he were not, this status should be decreed by the Courts of California where the marriage took place, where they lived as husband and wife, where Amy had her property, and where she died. Elizabeth was no part of this picture. If she has any rights in Pennsylvania, Connecticut, New York, Nevada, California or Vermont, they may be asserted there but on another day. We are not concerned with joint income tax returns, payments of alimony or even multi-state divorces. Our only concern is whether at the time of Amy's death Charles was her spouse. Nor are we concerned with the hypothetical multi-spouse situations envisioned by the Commissioner. We are not faced with problems possibly presented in polygamous countries, albeit our many monogamous seriatim marriages may be akin thereto.

As for *Borax* and *Wondsel, supra,* we take no pride in previous decisions if the principles formulated therein lead to an unjust result in the case before us; nor do we stubbornly adhere to the doctrine of "stare decisis" if there be no justification therefor. But far transcending the tax importance of this case (governments, state and federal will receive their fair share regardless of the decision) is our unwillingness on this record to assume the responsibility for declaring that Charles and Amy were not husband and wife in California. Very possibly there might be some merit to the words of Judge (now Mr. Justice) Marshall, writing for this Court in *Borax:*

> "[B]y depriving the determination of invalidity of any federal tax significance the rule of validation avoids a measure of unevenness and uncertainty: all those tax payers who have obtained a divorce in a particular jurisdiction are treated the same, regardless of whether the spouse against whom the decree has been obtained is able to, and does, invoke the power of another jurisdiction to declare that divorce invalid." 349 F.2d at 670.

By this principle, as taxpayers argue, "the living marriage and not the atrophied one is recognized." (Appellant's Reply Brief, p. 11). Such a rule will also avoid such problems as may arise where states have widely disparate codes of morals as to divorce and the grounds therefor (see *Steffke, supra*). The law respecting divorce has changed radically over the years. Procedures, too, have changed, and long arms reach out to jurisdictional lengths never previously imaged. If California and/or the Ninth Circuit have to come to grips with legal problems affecting the

Spaulding estate, this will more properly be their responsibility. For the moment, we are satisfied that Charles and Amy were husband and wife—hence spouses—in the State of California vested with the right of the marital tax deduction benefit appurtenant to that status.

Decision of the Tax Court reversed. On motion of the appellant, and with the consent of the Commissioner, the case is remanded to the Tax Court to consider appellant's claim to a deduction for attorneys' fees.

FOOTNOTE

[1] The relevant statute is Section 2056(a) of the Internal Revenue Code of 1954.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-438

IRVING D. LIPKOWITZ AND LEE J. GOLDWATER, EXECUTORS OF THE ESTATE OF LEO J. GOLDWATER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal estate tax case is whether decedent's bequest to a woman he "married" after obtaining an invalid Mexican divorce from his first wife was a bequest to a "surviving spouse" within the meaning of the marital deduction provisions of Section 2056 of the Internal Revenue Code of 1954 (26 U.S.C.). Both the Tax Court (Pet. App. B 10a-28a) and the court of appeals (Pet. App. A 1a-9a) held that decedent's bequest was ineligible for the estate tax marital deduction because it was not made to a "surviving spouse."

The pertinent facts are as follows: Decedent was a resident and domiciliary of the State of New York. He left a will bequeathing interests in property worth at least 50 percent of the value of his adjusted gross estate to Lee, whom he had "married" on December 9, 1958. Decedent

had previously married Gertrude B. Goldwater. In 1958, decedent had obtained a decree from a Mexican court "divorcing" him from Gertrude on the ground of their "incompatible temperaments." Shortly after decedent had obtained this Mexican decree and before he had "married" Lee, Gertrude began an action in the New York courts seeking a declaratory judgment that the Mexican divorce decree was invalid. In that action, decedent appeared and conceded that the divorce was invalid. The New York court thereupon entered a judgment declaring the Mexican divorce a nullity and further holding that Gertrude remained decedent's wife (Pet. App. B 11a-15a).

When decedent died, Gertrude filed a notice of election to take a share of his estate as provided under New York law for a "surviving spouse." Decedent's executors paid Gertrude $205,000 in compromise of that election. In the estate tax return they filed, however, decedent's executors claimed the maximum marital deduction allowable under Section 2056 of the Internal Revenue Code of 1954 on the theory that amounts left to Lee qualified as amounts passing to decedent's "surviving spouse" (Pet. App. B 15a-16a).

On audit, the Commissioner of Internal Revenue disallowed the claimed marital deduction to the extent the claimed amount exceeded the value of property passing to Gertrude. In a reviewed decision, the Tax Court unanimously upheld the Commissioner's determination (Pet. App. B 10a-28a). The court of appeals affirmed on the ground that the law of decedent's domiciliary state controlled the determination of his marital status (Pet. App. A 1a-9a).

1. The decision below correctly held that the decedent's bequest to Lee was not a bequest to a "surviving spouse" for purposes of the estate tax marital deduction. Section 2056 of the Code generally provides that an

estate may claim a deduction for the "value of any interest in property which passes or has passed from the decedent to his surviving spouse." The statute does not define the term "surviving spouse." Accordingly, pursuant to his authority under Section 7805(a) of the Code to "prescribe all needful rules and regulations," the Commissioner has announced that he will generally look to the law of the decedent's domicile to determine his marital status. See Rev. Rul. 67-442, 1967-2 Cum. Bull. 65.

Here, under the law of the decedent's domicile, Gertrude, and not Lee, was the decedent's "surviving spouse." From the time of his "marriage" to Lee in 1958, until his death in 1968, the decedent was domiciled in New York. In 1959, as a result of an action brought by Gertrude for a declaratory judgment decreeing the invalidity of decedent's Mexican divorce from her, the Appellate Division of the New York Supreme Court, First Department, held that the Mexican divorce was invalid and that decedent and Gertrude remained validly married. The court noted that decedent's "answering affidavit admits the invalidity of his Mexican divorce and asserts that he will not oppose * * * [Gertrude's] action for a declaratory judgment" (see Pet. App. A 3a). Since an intermediate appellate court of the state of decedent's domicile had concluded that decedent remained married to Gertrude, the Commissioner properly determined that only amounts passing from the decedent's estate to Gertrude qualified for the marital deduction as a bequest to a "surviving spouse."

2. Petitioners assert (Pet. 5, 9-10) that the decision below is inconsistent with *Borax' Estate* v. *Commissioner*, 349 F. 2d 666 (C.A. 2), certiorari denied, 383 U.S. 935; and *Feinberg* v. *Commissioner*, 198 F. 2d 260 (C.A. 3). Those cases upheld the deductibility as alimony of payments made by the taxpayer-husband as incident to a "decree of divorce" under Section 71(a) of the Code, despite the fact

that the courts of the taxpayers' domiciles had declared the foreign divorces obtained by them to be invalid.[1] In so holding, the court in *Borax' Estate* announced a "rule of validation" under which the subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is deemed to be of no consequence for purposes of the federal income tax deduction for alimony.[2]

Broadly construed, the rule of validation proposed in *Borax' Estate* might arguably conflict with the Commissioner's position sustained in this case that the law of the decedent's domicile will determine his marital status for tax purposes. However, the Second Circuit has not so construed its prior decision in *Borax' Estate*. As it stated

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[1]In *Wondsel* v. *Commissioner*, 350 F. 2d 339 (C.A. 2), certiorari denied, 383 U.S. 935, which petitioners also assert to conflict with the decision below (Pet. 4, 5), the Second Circuit followed its *Borax* holding in a situation where the courts of the first wife's domicile declared the foreign divorce to be invalid.

In Rev. Rul. 67-442, *supra*, the Commissioner announced that he would not follow *Borax' Estate* or *Wondsel*. The ruling stated that the Service generally will not question for federal income tax purposes the validity of any divorce decree unless a court of competent jurisdiction declares the divorce to be invalid. However, where a state court, in a proceeding in which there is personal jurisdiction of the parties or jurisdiction of the subject matter, declares the prior divorce to be invalid, the Service will usually follow the later court decision rather than the divorce decree for federal income tax purposes.

The ruling further announced that the Service will not follow *Borax' Estate* and *Wondsel* in the disposition of cases involving questions of marital status for estate and gift tax purposes, such as the marital deduction at issue here.

[2]*Borax' Estate* also held that the taxpayer was deemed to be married to his second "wife" for purposes of his eligibility to file a joint income tax return with her and to claim dependency exemptions for her parents and children of a former marriage (see 349 F. 2d at 675-676). However, this conclusion rested upon its primary holding that the invalid divorce would be given effect for purposes of the support payments claimed under the alimony deduction.

in this case, *Borax' Estate* carefully limited its holding to the alimony provisions of the Code (see 349 F. 2d at 670) and "does not purport to set forth a universal rule of tax code construction" (Pet. App. A 8a). Accord: *Estate of Steffke* v. *Commissioner*, 538 F. 2d 730 (C.A. 7), petition for a writ of certiorari pending, No. 76-315.[3]

Thus, unlike this case, where adoption of petitioners' position would produce the anomaly of a decedent having more than one "surviving spouse" for purposes of the estate tax marital deduction, *Borax' Estate* recognized that granting income tax effect to support payments made pursuant to otherwise invalid divorce decrees would conform to the entirely distinct congressional policy of placing the tax burden of "marriage settlement payments on the party entitled to their enjoyment" (349 F. 2d at 670; quoting from *Lerner* v. *Commissioner*, 195 F. 2d 296, 298 (C.A. 2)). Indeed, the court of appeals' refusal to extend its income tax holding in *Borax' Estate* to the estate tax area is in accord with the well-recognized rule that the estate and gift tax provisions are not to be construed in *pari materia* with the income tax statute. See *United States* v. *Davis*, 370 U.S. 65, 69 n. 6; *Farid-Es-Sultaneh* v. *Commissioner*, 160 F. 2d 812, 814 (C.A. 2).[4]

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[3]We are serving a copy of our memorandum in opposition in *Estate of Steffke* (No. 76-315) upon counsel for the petitioners.

[4]*Estate of Spalding* v. *Commissioner*, 537 F. 2d 666 (C.A. 2), cited by petitioners (*passim*), does not reject the rule urged by the Commissioner in these cases that the law of the decedent's domicile should govern his marital status for tax purposes. There, the courts of the decedent's domicile had not spoken on the question of the validity of her husband's Nevada divorce and the Second Circuit was unwilling to assume that the California courts would have held the divorce to be invalid even though a New York court had held it invalid. Absent such a determination, the Nevada divorce stood unimpeached, even though it was likely that a California court would have annulled it by giving

3. Finally, petitioners contend (Pet. 10-14) that under New York law decedent's first wife Gertrude's failure to join his second wife Lee in Gertrude's declaratory judgment action challenging the validity of the Mexican divorce rendered the judgment of the New York court a nullity. Apart from the fact that this determination of state law does not warrant review by this Court, the court of appeals correctly concluded that under New York law there was no need to join Lee in the proceedings because the decedent conceded by affidavit that his Mexican divorce was invalid (Pet. App. A 8a). Under these circumstances, there was no need to join Lee, whom the decedent had not yet even "married," as a party to the litigation.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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full faith and credit to the New York judgment, had the question of the validity of the Nevada divorce been presented to a California court. Cf. *Borax' Estate* v. *Commissioner, supra,* 349 F. 2d at 676 (Friendly, J., dissenting).

FILED
DEC 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-438

IRVING D. LIPKOWITZ and LEE J. GOLDWATER, Executors of the Estate of LEO J. GOLDWATER, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Respondent's memorandum in opposition contains several misstatements of fact and erroneous conclusions of law to which this brief is addressed.

1. At page 3 of his memorandum in opposition, respondent mistakenly describes the New York declaratory judgment obtained by Gertrude B. Goldwater ("Gertrude") as the judgment of an "intermediate appellate court." On the contrary, the only involvement of an appellate court in Gertrude's declaratory judgment action was in the context of the appeal of Leo J. Goldwater ("Leo") from an order of the lower court which had granted Gertrude's motion for a preliminary injunction restraining Leo from remarrying during the pendency of the action. The Appellate Division denied Gertrude's motion for preliminary injunction

and dismissed the cause of action alleged in her complaint for a permanent injunction.[1] The appellate court freed Leo to remarry but it never reviewed Gertrude's subsequent declaratory judgment.

2. At page 6 of his memorandum in opposition, respondent argues that there was no need to join Leo's second wife, Lee, as a party to Gertrude's declaratory judgment action, since Leo had not yet even married Lee. In fact, Leo married Lee in December 1958, two months before Gertrude obtained her declaratory judgment. For all of the reasons set forth in the petition, Lee was an indispensible party to that action under New York law and the court was powerless to bind the parties to any judgment rendered in her absence.

3. There is a clear conflict between the decision in this case and *Estate of Borax* v. *Commissioner*, 349 F. 2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966), which this court ought to resolve to settle the very important estate tax question here involved. While conceding that the rule of validation adopted by the Second Circuit in *Borax* "might arguably conflict with the Commissioner's position sustained in this case" (memorandum in opposition, p. 4), respondent erroneously states that *Borax* "limited its holding to the alimony provisions of the Code" (p. 5), although he does acknowledge by footnote that the case also involved joint income tax returns and dependency exemptions.[2]

Even if the alimony issue were distinguishable from the present issue, which we maintain it is not, it seems pre-

[1] See the Tax Court opinion, reproduced as Appendix B to the petition for a writ of certiorari, which correctly summarizes the applicable legal proceedings at pp. 13a—14a.

[2] But for the Commissioner's allowance of a full marital deduction for amounts passing to the second spouse, the estate tax marital deduction issue would presumably have been raised in *Borax* as well.

posterous that a man and woman should be treated as spouses to file joint income tax returns but that the survivor of the two should be denied the status of surviving spouse for federal estate tax purposes. If there is a reason for different treatment, it has not been advanced by the Commissioner either in the proceedings in the Tax Court, in the Court of Appeals or in opposition to the instant petition.

4. There is no basis for respondent's statement that adoption of petitioners' position would produce the anomaly of a decedent having more than one "surviving spouse" (p. 5). Under petitioners' position, Leo's Mexican divorce from Gertrude would be valid for estate tax purposes and his only surviving spouse would be Lee.

5. *United States* v. *Davis*, 370 U.S. 65 (1962) and *Farid-Es-Sultaneh* v. *Commissioner*, 160 F. 2d 812 (2d Cir. 1947), cited by respondent, are not applicable here. Those cases involved the question of whether a prenuptial transfer might be considered a gift under the gift tax laws, but at the same time a transfer for a valuable consideration under the income tax laws. The courts had little difficulty in determining that this apparent anomaly was possible, since the transaction was taxable as a gift in the first instance "merely because of the special provisions in the gift tax statute defining and restricting consideration for gift tax purposes." *Farid-Es-Sultaneh* v. *Commissioner*, *supra*, at 814. The decision that the unusual restrictions in the gift tax laws should not be imported into the income tax laws is entirely inapplicable here. Indeed, as we point out in the petition (pp. 6-8), the legislative history to the marital deduction provisions of the estate tax laws makes it abundantly clear that Congress intended that all provisions of all tax laws dealing with marital status be construed on a uniform basis.

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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